No. 14398

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER DESIMONE, JOHN STEPICH, HAROLD HOPKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY,
United States Attorney

RICHARD D. HARRIS,
Assistant United States Attorney

JOHN A. ROBERTS, JR.
Assistant United States Attorney

Attorneys for Appellee

Office and Post Office Address:
1012 U. S. Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 12/18/54 — 25 COPIES

No. 14398

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER DESIMONE, JOHN STEPICH, HAROLD HOPKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY,
United States Attorney

RICHARD D. HARRIS,
Assistant United States Attorney

JOHN A. ROBERTS, JR.
Assistant United States Attorney

Attorneys for Appellee

Office and Post Office Address:
1012 U. S. Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 12/18/54 — 45 COPIES

INDEX

TABLE OF CASES

STATUTES

RULE OF PROCEDURE

No. 14398

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER DESIMONE, JOHN STEPICH, HAROLD HOPKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

JURISDICTION

The appellee adopts the statement of jurisdiction set forth in the appellants' brief.

STATEMENT OF THE CASE

The statement of the facts set forth in appellants' brief is in general a fair resume of the record, but

in view of the fact that appellants' argument relates to the sufficiency of the evidence to support the judgment and sentence, the appellee deems it necessary to outline the evidence in more detail, and to view it in a light more favorable to the Government, the prevailing party in the lower court.

The evidence shows that a business was being operated at 9616 17th S. W., Seattle, Washington, and that this business used the name, "White Center Athletic Club, Inc., and operated as a retail liquor dealer without a Federal Retail Liquor Dealer's stamp tax, all during the period commencing on July 1, 1951 and ending May 8, 1952. It further shows that the names, Peter Desimone, John F. Stepich and Harold Hopkins, were connected with this business in July 1951, and continuously throughout the period alleged in the indictment. The co-defendant, Russell W. Felton (not an appellant) was in the business in July of 1951 (R. 247) while the co-defendant Bert DePierris (not an appellant) joined the business in December of 1951 (R. 277). The establishment sold liquor over the bar to anyone who could gain admittance (R. 168, 169, 87-92) and apparently the only requirement for admission was an ability to convince the door-man that you were not a law enforcement agent. A customer could also buy meals at the establishment as well as play the slot machines.

During the period in the indictment the premises were entered by State and local law enforcement officers on a dozen occasions, at least six of which were on the authority of county search warrants. The defendants Desimone, Felton, and DePierris all maintained to the officers that they were NOT selling liquor, BUT only selling service. This was refuted by the evidence throughout, and by the admission of the defendant Felton to the witness Turner (R. 141) and Felton's testimony (R. 266, 269).

Appellants' reference to the evidence on p. 4 of their brief relative to the lack of a Federal Retail Liquor Stamp is correct in its details, as well as the physical description of the premises.

Appellants then refer to each of the co-defendants and Charlotte Fulford, individually. The first person discussed is one of the appellants, Peter Desimone. The statement concerning him is correct as far as it goes (Appellants' Brief pp. 5 and 6) but it should be added that Desimone signed Exhibits 2 and 5 as manager, and/or Vice President of the White Center Athletic Club, Inc.; that he also admitted customers after interrogating them, and otherwise acted as manager of the establishment.

It should also be mentioned that the present counsel for the appellants, Max R. Nicolai, appeared as a

witness for appellee (R. 105-108), and that he did not represent any of the defendants in the trial court below, that all of the defendants were then represented by George J. Toulouse, Jr. and John Spiller, Attorneys at Law. The witness Nicolai testified that in March, 1952 he had been retained by Mr. Desimone to represent the White Center Athletic Club in some other litigation. Desimone admitted having a "house stock" of liquor (R. 132), and when asked to see his Federal Retail Liquor Dealer's tax stamp, he said he didn't need one because he wasn't selling whiskey, but just selling service (R. 133, 147). The seals on the liquor bottles were defaced (R. 148) so that the numerals weren't legible on the Federal strip stamp. Desimone obviously let Felton and DePierris "hold the bag" on the local state liquor violations. Furthermore, from all of the evidence it is obvious that Desimone and the other appellants had no intention of securing a Federal Retail Liquor Dealer's tax stamp for one reason only, that is, that the possession of such a stamp would make a prima facie case in the state courts that they were operating as a retail liquor dealer and not, as they would insist with tongue in cheek, that they were just selling service.

Desimone advised Felton and DePierris to stick to the story about selling service and not liquor. One of the employees, Fulford, took steps to cover

a situation involving an Orthopedic Guild dinner party when she handed a list of liquors to Mrs. Noble, (R. 115) and gave her instructions as to what to do if they had any trouble with the State Liquor Board men. In this particular situation arrangements had been made sometime earlier by appellant Hopkins with Dixie Schwier whereby liquor could be purchased by the drink (R. 110).

Appellants make reference to Charlotte Fulford, but as she was not a defendant, no further reference will be made to her, except as she may appear otherwise in the case.

The next reference is to appellant John Stepich, whose name appears on Exhibits 2 and 4 as President of the White Center Athletic Club, Inc. The incorporation papers also show him as President of the White Center Athletic Club, Inc. (R. 176, 178). On January 18, 1952 Stepich was on the premises (R. 145, 152); he was sitting at the bar after the inventory of the liquor that was seized by the state officers was made. The testimony shows that he acted as a doorman and interrogated the witness Daggett before allowing him admission onto the premises (R. 169, 182, 183, 184, 185) and that he had free access to the office, or cashier's cage, into which not even employees were allowed to enter (R. 170, 282); that Stepich was in that room

several times and the witness purchased dimes from him in order to play the slot machines (R. 170, 174, 175, 186). The testimony also shows that he was regular in his attendance, at least on every Monday night (R. 268). That he continued to attend the club after the search warrant of February 4, 1952 was executed (R. 126), even after the fact that the establishment was operating without a Federal Retail Liquor Dealer's tax stamp was made known to the manager, Desimone. That Stepich's name was used after that on various tax reports, and the signatures appear the same, that he acted as doorman and interrogated the witness, Daggett, on May 6, 1952, before allowing him on the premises.

The remaining appellant to whom reference is made is Harold Hopkins, whose name appears on Exhibits 1, 2, and 4, as Secretary-Treasurer of the White Center Athletic Club, Inc. During January of 1952, the witness Schwier made arrangements with Hopkins at the White Center Athetic Club, to hold a dinner dance there, which included dinner and drinks (R. 110), and that drinks could be purchased at the establishment. On February 4, 1952, Hopkins was tending the door (R. 130, 131, 155) and that Hopkins was present when Desimone was questioned by the state officers concerning the Retail Dealer's Federal tax stamp (R. 133). On that occasion Hopkins also mentioned that

the liquor belonged to the club having a stag party there that night (R. 135) even though some of that liquor was referred to as "house stock" (p. 287). On March 29, 1952, in cause No. 441309 in the Superior Court for the State of Washington, County of King, entitled *State ex rel Chas. O. Carroll, Prosecuting Attorney of King County, Relator, vs. White Center Athletic Club*, a corporation, et al, defendants, the appellant in this case, Harold Hopkins signed under oath, sworn to before the now attorney for the appellants, that he, Hopkins, was secretary-treasurer of the White Center Athletic Club.

No additional reference will be made to the defendants Russell W. Felton and Bert DePierris except as they might appear in connection with the others, as they are not appellants in this cause.

SUMMARY OF ARGUMENT

The appellants were tried and convicted in the district court upon the charge of conspiring to violate the provisions of Title 26, U.S.C., Section 3253, rendering it illegal to carry on the business of a retail liquor dealer and in so doing to wilfully fail to pay a special tax required by law. The appellee asserts that no material errors of law occurred during the trial of the action and that the evidence adduced in support of this charge established beyond a reasonable

doubt the existence of a conspiracy by, between and among these appellants.

ARGUMENT

1. ANSWERING POINT I OF APPELLANTS' ARGUMENT, page 17 of their brief the appellee asserts that there is an overwhelming amount of evidence to support the court's findings and respectfully submits that a review of the entire record conclusively establishes the knowledge, intent and co-participation of these appellants in the conspiracy. Appellee's views in this regard were shared by the trial judge, an eminent jurist with over twenty years' experience on the trial bench, who had the opportunity of viewing and evaluating, first hand, the testimony of all of the witnesses in the case.

On at least six different occasions during the period alleged in the indictment when investigators for the Washington State Liquor Control Board examined the club premises pursuant to search warrants, demand was made upon one or more of the defendants to exhibit the Club's Federal retail liquor dealer's tax stamp.

On October 26, 1951, pursuant to a search warrant, the club premises were investigated by law enforcement officers and large quantities of spirituous

liquors were confiscated (R. 122, 123) and at that time demand was made upon defendant Felton for the Federal retail liquor dealer's tax stamp. It should be noted that in each instance where the evidence shows that bottles of spirituous liquor were confiscated, the witnesses testified that the Federal strip seal over the head of the individual bottles had been defaced so that an identification of the chronological numbering system of the bottles was impossible (R. 148).

On January 18, 1952, the premises were again raided by law enforcement agents pursuant to a search warrant and demand was at that time made upon defendant DePierris for the Club's Federal retail liquor dealer's tax stamp (R. 129). The evidence further shows that appellant John Stepich was on the premises at the time and was interrogated by the officers (R. 145, 152).

It is noted that between the last two dates mentioned, appellant Hopkins, acting in a managerial capacity for the Club, made arrangements for an Orthopedic Guild dinner and specifically made arrangements for those in attendance at the dinner to purchase liquor by the drink from the Club (R. 110).

Again on February 4, 1952, pursuant to a search warrant, officers entered the Club premises at which

time defendants Desimone, Hopkins, DePierris and Felton were present and at which time demand was made to see the Club's Federal retail liquor dealer's tax stamp (R. 130-135, 147, 155).

Again on March 1, 1952, pursuant to a search warrant, officers entered the premises at which time defendants DePierris and Felton were present, and demand was made to exhibit the Federal tax stamp. It is noted that in each of these instances where officers made demand for the tax stamp, the defendants and all of them stated that they did not need such stamps, that they were selling service, not liquor. (R. 135-137).

Officers conducted another raid on March 12, 1952, at which time defendant DePierris was asked about a Federal tax stamp (R. 139). Again on April 6, 1952 (R. 141) officers entered the Club premises pursuant to a search warrant and at that time made demand upon defendant Felton for the retail liquor dealer's tax stamp. It is noted that the defendant Felton finally admitted that he had been employed by the White Center Athletic Club, as a bartender and that he did sell liquor by the drink in violation of the Washington State Liquor Act (R. 259).

The appellee submits that it is fundamental law that knowledge to an agent conveyed in the ordinary course of business is knowledge to the principal and

that one partner is charged with knowledge conveyed to another partner in matters relating to the partnership business.

> Revised Code of Wash., Sec. 25.04.120
> PARTNERSHIP CHARGED WITH KNOWLEDGE OR NOTICE TO PARTNER.
>
> "Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonable could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner."

It is further submitted that a criminal conspiracy need not be proven by direct evidence, but may be inferred from a collection of circumstances. *Glasser v. United States*, 315 U.S. 60, 80. The agreements involved in conspiracies are usually made secretly and ordinarily cannot be proven other than by circumstantial evidence. *Jianole v. United States*, 299 Fed. 496, 498; *Ryan v. United States*, 99 F. (2d) 864, 869, cert. den. 306 U.S. 635. In this regard, evidence showing a concert of action in the commission of unlawful acts from which a natural inference arises that the unlawful overt acts were in furtherance of a common design may be sufficient to show an unlawful agreement. *United States v. Holt*, 108 F. (2d)

365, 368, cert. den. 309 U.S. 672; *Windsor v. United States*, 286 Fed. 51, 53, cert. den. 262 U.S. 748.

In their brief the appellants refer to and rely heavily upon the case of *United States v. Falcone, et al*, 109 F. (2d) 579 affd., 311, U.S. 205. The appellee submits that the facts of that case are substantially different from the facts in the instant matter in that a sugar producer necessarily deals with many and varied users of sugar products, whereas one who deals in the retail liquor business has only one type of customer.

The appellants make some issue of the fact that the cost of the tax stamp involved is only $50.00. However, as has been indicated herein before, the evidence is conclusive that while these appellants and all of the defendants knew that the White Center Athletic Club should have a Federal tax stamp, they also knew that the possession of such a stamp would make a prima facie case in a state court that they were operating as a retail liquor dealer, contrary to the Washington State Liquor Act.

Considering this view of the evidence, appellee submits that a conspiracy of this type can be described as a "partnership in crime". *(United States v. Socony-Vacuum Co.*, 310 U.S. 150, 253)and that a formal agreement is not necessary, but that it is sufficient

that the minds of the parties met understandingly so as to bring about an independent and deliberate agreement or even a mutual implied understanding. *Marx v. United States*, 86 F. (2d) 245, 250; *Hyde v. United States*, 225 U.S. 347, 376.

II. ANSWERING POINT II OF THE APPELLANTS' ARGUMENT found on page 28 of their brief, it is submitted that the trial court entered General and Special Findings of Fact pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure and that said General and Special Findings of Fact support the Judgment of conviction.

It is noted that pursuant to the above cited Rule, the Court, in cases tried without a jury, is directed to make general findings of fact, and, if requested, special findings of fact. In the instant case, the Court, pursuant to the defendants' request, did find the facts specially. However, it is respectfully submitted that it would be novel rule of law that would require a Court to enter findings of fact contrary to the expressed conviction of the trier of the facts. The trial court, therefore, was justified in not accepting the special findings of fact proposed by the defendants.

The appellee submits that Special Finding of Fact I (R 20) is a statement of the ultimate facts to be found in the case concerning the element of conspiracy between and among the defendants and is in com-

plete and full compliance with Rule 23(c), Federal Rules of Criminal Procedure.

The Appellee urges that there is overwhelming evidence, as noted in the appellee's Statement of Fact, herein, as to the overt acts found in Finding No. III (1), (2), (3) and (4), and Finding No. IV (1), (2), (5) and (11), (R. 21-25).

III. IN ANSWER TO POINT 3 OF APPELLANTS' ARGUMENT found on page 31 of their brief, appellee submits that the trial court properly admitted plaintiff's exhibits 2, 4 and 5 after having received other competent evidence and testimony bearing on the question of conspiracy between and among the defendants and that these exhibits are proper evidence of the case to be considered with the other evidence for whatever weight they may lend to prove the conspiracy charge. The appellee further submits, particularly with respect to plaintiff's exhibits 4 and 5, that Section 3809, Title 26, U.S.C., appears to be determinative of the question of admissibility of these exhibits. The pertinent portion thereof reads as follows:

> "(b) *Signature Presumed Correct.* The fact that an individual's name is signed to a return, statement or other document filed shall be prima facie evidence for all purposes that the return, statement or other document was actually signed by him."

It is further noted that the written signatures of each and all of the defendants appear on the Stipulation Waiving Trial by Jury (R. 10) and that insofar as these exhibits bear the identical names of the various defendants, the name of the White Center Athletic Club, Inc. and dates material to the times alleged in the indictment herein, these exhibits are admissible for whatever weight the trier of the facts may lend to them.

Sec. 1731, Title 28, U.S.C.:

> "*Handwiriting.* The admitted or approved handwriting of any person shall be permissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

IV. UNDER POINT 4 OF APPELLANTS' ARGUMENT, page 37 of their brief, it is urged that the defendants' motion to dismiss the indictment should have been granted.

The appellee submits that this motion was untimely and should have been presented and argued at the time of the hearing on the defendants' Motion to Strike and to Dismiss the Indictment (R. 8).

The appellee further submits that Sec. 3253, Title 28, U.S.C., the pertinent portion of which is cited in appellants' brief at page 37, defines one and only one crime. However, the statute clearly defines two spe-

cific elements which constitute the crime. They are, in substance, (1) to carry on the business of a retail liquor dealer (and no other kind of business) and (2) while carrying on such business, to wilfully fail to pay the special tax as required by law. It would therefore appear obvious that the indictment must allege, as it does (R. 3), each of these elements and that it is entirely proper to preface the two allegations of fact with the words "wilfully and unlawfully".

CONCLUSION

The trial judge personally observed all of the witnesses, considered all of the circumstances and facts of the case and found, beyond a reasonable doubt, that the defendants, including these appellants, were guilty of the conspiracy charged in the indictment. It appearing that no material errors of law occurred during the trial of the action, it is respectfully submitted that the judgment and sentence of conviction be confirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

RICHARD D. HARRIS
Assistant United States Attorney

JOHN A. ROBERTS, JR.
Assistant United States Attorney